

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

FILED

MAR 02 2018

Clerk, U S District Court
District Of Montana
Billings

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

DEAN LaFROMBOISE,

Defendant/Movant.

Cause No. CR 94-82-BLG-SPW
CV 18-44-BLG-SPW

ORDER DISMISSING AND
TRANSFERRING § 2255 MOTION
AND DENYING CERTIFICATE OF
APPEALABILITY

On March 1, 2018, Defendant LaFromboise filed a motion asking the Court to “recognize and correct an error that is plain and affects a defendant’s substantial rights.” Mot. for Plain-Error Review (Doc. 828) at 1. LaFromboise, a federal prisoner proceeding pro se, relies on Federal Rule of Criminal Procedure 52(b).

None of the Rules of Criminal Procedure, including Rule 52(b), authorize the re-opening of a final judgment. That authority must be provided by Congress. It is provided in 28 U.S.C. § 2255. *See* 28 U.S.C. § 2255(a). But LaFromboise has already litigated one § 2255 motion to completion. *See* Orders (Docs. 707, 734).

The Court of Appeals has not authorized LaFromboise to file a second § 2255 motion in this Court, *see* 28 U.S.C. §§ 2255(h), 2244(c), so the motion must be dismissed for lack of jurisdiction, *Burton v. Stewart*, 549 U.S. 147, 149 (2007) (per curiam). A time bar or procedural bar might apply, but those issues cannot be

determined in a court that lacks jurisdiction.

A certificate of appealability is denied because the case is clearly controlled by *Burton. Gonzalez v. Thaler*, ___ U.S. ___, 132 S. Ct. 641, 648 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Although this Court lacks jurisdiction, the Court of Appeals has jurisdiction to consider an application for leave to file a second § 2255 motion. The motion will be transferred to the Court of Appeals. *See* 28 U.S.C. § 1631.

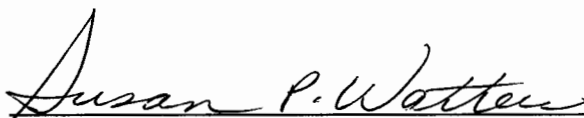
Accordingly, IT IS HEREBY ORDERED:

1. LaFromboise's motion (Doc. 828), recharacterized as an unauthorized second or successive motion under 28 U.S.C. § 2255, is DISMISSED for lack of jurisdiction and TRANSFERRED to the Court of Appeals.

2. A certificate of appealability is DENIED. The Clerk of Court shall immediately process the appeal if LaFromboise files a Notice of Appeal.

3. The Clerk of Court shall ensure that all pending motions in this case and in CV 18-44-BLG-SPW are terminated and shall close the civil file by entering a judgment of dismissal.

DATED this 2nd day of March, 2018.



Susan P. Watters
United States District Court